BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY A. NAGY	)	
Claimant	)	
	)	
VS.	)	
	)	
CHARLOMA, INC.	)	
Respondent	)	Docket No. 1,003,070
	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on July 26, 2002.

ISSUES

The Administrative Law Judge (ALJ) determined claimant failed to sustain his burden of proof that he suffered accidental injury arising out of and in the course of his employment with the respondent.

Claimant argues the fact that he suffered a work-related back injury is corroborated by the fact that he gave notice of injury to respondent's human resources manager. Although the human resources manager denies claimant told her he hurt his back at work, claimant points to handwritten notes on an exhibit as an indication the human resources manager was aware claimant was alleging a work injury.

Respondent argues the preponderance of the evidence supports a determination claimant failed to meet his burden of proof to establish he suffered accidental injury arising out of and in the course of employment and the ALJ's order should be affirmed.

The sole issue for Board review is whether claimant suffered accidental injury arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was hired as a machine operator and began his employment with respondent on February 12, 2002. Claimant worked the second shift from 2 p.m. to 10 p.m. As part of his new employee indoctrination, claimant was provided written material which explained respondent's policies regarding attendance as well as reporting work-related injuries.

Claimant operated a bandsaw and would take scrap pieces of plastic and cut them down to place in a chipper where the material is pelletized. A vacuum takes the pellets from the chipper and the pellets are dropped into an approximately three foot square industrial cardboard container.

On February 14, 2002, claimant alleged he injured his back when he slipped on some pellets that were on the floor but caught himself before he fell to the floor. Claimant testified he immediately notified his supervisor. Claimant also alleged his supervisor told him to shake the container being filled with pellets and that when he grabbed the container to shake it his back popped. Claimant further alleged when he took the off-work slip from his personal physician to the respondent's human resources manager he told her he had hurt his back at work.

On cross-examination claimant testified the slip incident had occurred on February 14, 2002, but that the incident of shaking the pellet container occurred a few days later on approximately February 18, 2002. Claimant then noted that he was not sure when the incident occurred. Claimant testified he advised his supervisor that he had popped something in his back while shaking the pellet container.

Claimant missed work on February 20, 21 and 22. Respondent's policy required an employee to call in before their shift if they were not coming to work. Claimant testified he called in a couple of times but no one answered the phone. The respondent's human resources manager, Carolyn Sourk, testified the plant number is always answered either by the receptionist or by an answering machine. She further testified that when claimant had filled out the employment forms he had listed his wife as a contact and had given a telephone number. After claimant had missed work for three days without calling, the human resources manager called the number and left a message with the woman who answered the phone that claimant should call the human resources manager if he wanted to continue with his employment.

Claimant denies he called the human resources manager and testified he does not have a phone. The human resources manager testified claimant called her later in the day on February 22, 2002. She testified the claimant told her he had been at a parole meeting

on Wednesday and had a stomach virus the following two days. Claimant was advised he needed a doctor's release in order to return to work the following Monday.

On Monday, claimant provided Ms. Sourk with a return-to-work release from his personal physician. The note indicated claimant had been under the doctor's care from the twentieth through the twenty-second and claimant was released to return to work on the twenty-fifth. The note did not contain any further information.

Claimant neither returned to work nor called in on the twenty-fifth, twenty-sixth or twenty-seventh of February 2002. Claimant's employment was terminated on the February 27, 2002, for missing 6 out of 12 workdays with repeated no call, no shows.

Randall Bennett, respondent's shift supervisor and claimant's supervisor, testified claimant never told him he had slipped on the job on February 14, 2002, and hurt his back. Mr. Bennett further testified claimant never reported he hurt his back shaking the pellet container. Moreover, Mr. Bennett testified claimant never alleged any back injury or that his back was hurting and needed medical care.

Mr. Bennett further explained that the pellet container weighed from 800 to 1,200 pounds and a forklift was always used to shake the container. Accordingly, he testified he never advised claimant to shake the container. The second-shift manager, John Scott, corroborated that the container weighed too much for any employee to manually shake. Mr. Scott also confirmed that claimant never reported a work-related injury to him. Lastly, Mr. Scott identified a poster placed at the time clock and the entrance to the employee break room that listed what an employee was to do if injured at work.

Carolyn Sourk, respondent's human resources manager, testified claimant never advised her he had injured his back at work. She specifically denied claimant's assertion that she was told about claimant slipping and hurting his back and later popping his back while shaking the pellet container. Ms. Sourk testified the first time she became aware claimant was alleging a work-related injury was when she received a written claim for compensation signed on April 1, 2002.

Ms. Sourk agreed that on February 25, 2002, claimant provided her with his personal physician's release to return to work. She further agreed that she made notations on the back of the release which contained the comments: "Weds. parole mtg., Thurs. back hurt, Fri. sick/hurt, Mon. Return to work." Ms. Sourk explained the notations were made as she investigated the claim but that she could not recall whether she made them before or after claimant was terminated.

The contemporaneous medical record from claimant's physician on February 21, 2002, contains a history that claimant twisted to move something on February 14, 2002, and hurt his low back. In a letter the doctor explained claimant had indicated that it might have happened at work but had declined to specify it was a work-related injury at that time.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

There is conflicting evidence regarding whether claimant provided notice and whether the manner in which he alleged his injury occurred was plausible. The ALJ observed claimant testify and after consideration of the deposition testimony concluded claimant's version of events was not credible. The Board agrees.

There are numerous inconsistencies in claimant's version of events which undermine his credibility. Although claimant's slipping incident could have been unwitnessed, the supervisor and shift-manager both testified it was unlikely because of the number of employees that worked in claimant's area.

Claimant's testimony that he was required to shake the pellet container was denied by his supervisor and the fact that the container was extremely heavy and only shaken using a forklift corroborated the supervisor's testimony.

Claimant explained that his absence on Wednesday, February 20, 2002, was because his parole hearing lasted too long. When hired claimant had agreed such monthly hearings could and would be scheduled before his second-shift work time. Moreover, the physician release claimant later provided indicated claimant had been under doctor's care on that date.

Claimant testified he called respondent on a couple of occasions when he could not make it to work but no one answered the telephone. The human resources manager testified the telephone is answered 24 hours a day either by a receptionist or an answering machine and there were no messages from claimant. Lastly, claimant's assertions that he notified his supervisor and the human resources manager about his work-related injuries were unequivocally denied.

The preponderance of the credible evidence supports the ALJ's finding claimant failed to sustain his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

In addition, the injured worker is required to give the employer notice of accident, within 10 days after the date of a work-related accident, or establish just cause for not

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[1] K.S.A. 44-501(a).

[2] K.S.A. 44-508(g).

giving the employer the 10-day notice within 75 days.[3] Here, the claimant contends that he proved through his testimony he gave respondent timely notice of his February 14, 2002, and February 18, 2002, accidents by notifying certain management employees of the accident within the required 10 days. The Board finds more persuasive the testimony of the claimant's supervisor, shift-manager and human resources manager that claimant did not provide timely notice of any work-related injuries.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated July 26, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation

[3] *See* K.S.A. 44-520.